

**PUBLIC DEFENDER COMMISSION**  
**Minutes**  
**Friday, August 26, 2005**  
**State Bar of Montana Conference Room, Helena**

**Call to Order:**

The Public Defender Commission meeting was called to order at 9:05 A.M. by Chairman Jim Taylor.

**Introduction of Members:**

Betty Bichsel was introduced at this meeting, as she was unable to attend the first meeting in July. Betty provided personal background, experience, and her interest in being a member of this Commission.

**Members Present:**

Betty Bichsel, Edgar, Daniel Donovan, Great Falls, Caroline Fleming, Miles City, Jennifer Hensley, Butte, Wendy Holton, Helena, Doug Kaercher, Havre, Stephen Nardi, Kalispell, James Park Taylor, Pablo, Mike Sherwood, Missoula, Tara Veazey, Helena.

**Members Absent:**

Theda New Breast, Babb

**Other Interested Parties:**

Don Judge, Teamsters Local 190; Brent Doig, OBPP; Chris Manos, State Bar of Montana; Beth Brenneman, MT Advocacy Program; Dana Chapman, ACLU; Steve Bender, Garrett Bacon, Dal Smilie, Jeannie Wolf, and Aggie Wismer (Recorder), DOA.

**Approval of Minutes from the July 29, 2005 Meeting:**

Corrections to the minutes from the July 29, 2005 meeting:

Page 15      Addition Under Butte Office Selection:  
**Jennifer Hensley defended Butte and extended an offer for the Commission to visit Butte.**

Page 11      Name change:  
Chris Mangos to **Chris Manos**.

Change:  
.....practice in a rural county was apathetic .....defenders in their own mindset could have done a better job .....

To read:

.....practice in a rural county **he was empathetic** over the fact that there was good criminal defense public **defenders**. **There were some who** could have done a better job for their clients.

Change:

That is the challenge of the legislative process, and appreciate the fact, now gone through two legislative sessions, the legislature only gets those people who have interest to show up for the hearings

To read:

.....**and I appreciate the fact now, having gone through two legislative**

.....

Page 10      Public Comments – Beth Brenneman

Change:

Voluntary to **involuntary**

**Motion and Vote:** With the above corrections noted, a motion was made by Doug Kaercher to amend and approve the minutes, seconded by Jennifer Hensley. The motion carried unanimously.

Jim Taylor noted for the purpose of clarification that at the last meeting with the adoption of the working procedures, amended Robert's Rule of Order to the extent that the Chair was allowed to vote. After reading Robert's the Chair is not supposed to participate in debate. Jim indicated that since he is allowed to vote he is also allowed to participate in debate and wanted to check that this was the intent of the Commission when they voted, which indeed it was.

**Rearrangement of Agenda to accommodate the time lapse:**

**Motion and Vote:** Jim Taylor made a motion to adopt the agenda by moving the working lunch items to fill in for the lapse of time on the agenda and seconded by Steve Nardi. The motion carried unanimously.

**Juvenile Conference:**

A Juvenile Defender Leadership Conference will be held on October 21<sup>st</sup>-23<sup>rd</sup> in Los Angeles. One of the best in the country but given that a Chief is not yet on board it would be best to wait until next year to attend.

**National Legal Aid & Defender Association:**

The National Legal Aid and Defender Association (NLADA) Defender Impact Leadership 2005 will be held on September 11-14 in Phoenix-Scottsdale. It was recommended that a member of the Commission attend. Tara Veazey mentioned that she was attending the civil portion the latter part of the week and volunteered to attend

the earlier defender impact portion and those expenses will be covered by the Commission.

### **North Dakota Commission on Legal Counsel for Indigents:**

Brian Smith, Public Defender, Missoula sent Jim Taylor an e-mail about North Dakota that is almost in exactly the same place as Montana. They have just adopted a new act, appointed a new Commission, beginning a search for an Executive Director (not calling this position or hiring a Chief Public Defender), and are in the process of drafting and adopting standards. Jim has been in contact with the Chair of that commission (Joseph Michael) and will keep in touch and compare notes on the progress of these two Commissions and try to keep from reinventing the wheel between the two states. North Dakota has not yet set a salary range for their Executive Director, thinking in the range of \$70,000 to \$85,000.

### **Web Page Update:**

Steve Bender, DOA, indicated that development was only started this week on the webpage and waited as content was needed and didn't want to put up a blank shell. There is some content and will be more after this meeting and should be available in a couple of weeks. The url address will be [publicdefender.mt.gov](http://publicdefender.mt.gov) and as soon as up the Commission will be sent a link to publicize meeting, minutes, and later policies, procedures, and standards. No problem with either the State Bar or the court website linked to this webpage.

### **Malpractice Update:**

Steve Bender, DOA, provided an update on malpractice. The activities of the public defender system will be under the state's watch. DOA insures all state employees, properties, forms of insurance including malpractice. There is no problem providing insurance coverage to the new members of the public defender system. This is fairly low risk, MACO has been contacted and there hasn't been a history of problems. If for some reason it would get unmanageable can entertain the option of purchasing private insurance in the future. DOA is more than willing to accept the risk. Might have to think about what to do for assigned counsel, whether professional liability is already covered and how it will be addressed in the future. Anticipating no problems no budget hits and will build insurance coverage into the next biennium's budget.

Chris Manos, State Bar of Montana, added he knows that the bill addresses the fact that if there is a complaint against an attorney, there was a question early on about the conflict between the Office of Discipline Counsel that the court set up because of the rules of professional conduct does not necessarily result in malpractice issues but are professional and technical issues. Chris wanted to make the Commission aware that the state needs to make sure to coordinate if there are complaints, that those might have a dual reporting to and the way the system is set up with the Chief Public Defender and the interaction between the Office of Discipline Counsel, particularly

important since there is a new discipline counsel on board learning the process (Shawn Thompson). It was suggested by the Chair to invite him to a future meeting.

Dan Donovan - an issue is raised that under the ALPS coverage, the ALPS coverage will provide \$2,500 toward the legal fees if there is an ethical complaint. Would the self-insured state coverage provide that?

Steve Bender, DOA, indicated that we defend the acts of state employees for a wide variety of causes, similarly would be in a position to do that in case there is an allegation of a conflict. There have been some internal discussions with the head counsel from Tort Defense and naturally he felt somewhat conflicted that his office would be asked on normal courses. Private attorneys are used and we deal with own private conflicts by reassigning to different staff member or different attorney. We will provide (in-house) counsel for ethical complaints for the defender counsel through the use of Tort Defense. Might have to drill down a little more on the assigned counsel as they are acting as if they were a contractor for the state, so they are our agent, and we are pulled into covering them too.

#### **Update for Standards for Indigent Defense:**

As Mike Sherwood's cover letter indicated he is the sole member of this Commission who is on the Appellate Defender Commission that is due to expire in 2006 when this new system goes into effect. One of the duties of the Appellate Defender Commission, in addition to overseeing the current Appellate Defender Office which will be incorporated into this office, was to propose standards to the Montana Supreme Court for their review and expected adoption. About the time the Supreme Court was to be making a decision on those standards they issued an order saying that it was mute because of the current Public Defender Act which dictates that this Commission propose those standards. In his letter he also pointed that the Appellate Defender Commission had one layperson for every four, no prosecutors but a judge. The 33-page Standards for Counsel (handout) was reduced from thousands of pages of standards that have been proposed (by National Association of Criminal Defense Lawyers, by various states, state bars, ABA, and others) or adopted. Lot of time was spent deciding what was best for Montana. Mike's job was to do the drafting, reduce the number of pages, give options, and ultimately come up with a draft. The proposal that was made clearly conflicts in part with the language and terminology and some of the mandates in the Public Defender Act. Mike went through the proposed Appellate Defender Commission standards and attempted to make them mesh with the language of the Public Defender Act. As indicated by the document the stricken language is from the Appellate Defender Commission's proposed standards draft and where in caps and bold is the language that was added.

Chairman Taylor indicated that this was a real good start and there are some areas where guidelines are needed. The Act does require us to establish guidelines and standards for all the work the public defenders will be doing that will include involuntary commitments and child protection cases. Chairman Taylor proposed a sub-committee

be set up to begin working on a set of draft standards that not only covered what Mike Sherwood has done but the other areas as well. Steve Nardi made a **motion** for the Chairman to appoint a sub-committee to look into and study the standards and come up with draft proposals. Caroline Fleming seconded and the motion carried unanimously. The sub-committee members include Chairman Taylor, Wendy Holton, Mike Sherwood, Tara Veazey and Betty Bichsel.

### **Open Meeting Law:**

Dal Smilie, Chief Legal Counsel, Department of Administration pointed out that the general rule is that all meetings of public boards, councils, and commissions are open to the public, almost all the time. It is a very strong right in Montana and it is one of the fundamental rights of the beginning of the Montana constitution (Article II, sec. 8, and sec 9). As part of an open meeting adequate notice is required (at least 72 hours). A meeting of less than a quorum need not be open. There must be an agenda that includes an item allowing the public to comment and those comments can be of anything of interest, but no action is taken on those comments. Minutes are taken and are to be kept. If you fail to open your meeting the plaintiff gets costs and fees and actions taken are likely void. Meetings can only be closed where the demands of individual privacy exceeds the merits of public disclosure.

E-mails may or may not be a public record depending largely on whether it is kept. The basic rule for e-mails is that they are kept in so many ways – disaster recovery files, by other person, or passed on. The question is since it is still out there can someone get it by discovery or right to know. The press at times wants to see someone's e-mails, so therefore, it is best to write any e-mail in a way that you would be proud to have it on the front page of the newspaper and be as official, clear and concise as possible.

### **Administrative Rules (Montana Administrative Procedures Act):**

Jeanne Wolf (Retired Department of Administration Employee) gave an overview of the rulemaking process as to the purpose, definition, and requirements. The process involves writing rules, draft proposal notice, receive comments and hold hearing, draft adoption notice, and prepare ARM replacement pages. Agencies have to be granted rulemaking authority from the Legislature, so agencies cannot just go out and adopt rules without having that authority. An important part is allowing public participation and that is why the rulemaking process allows and is geared to that and the procedures must be followed in the Montana Administrative Procedures Act. This ensures that the public is participating in that process. The entire process from beginning to end takes approximately six months.

Chairman Taylor said it would be a good idea to have a sub-committee on rules that would be responsible for sorting through this with DOA and deciding what rules are needed or not. Chairman Taylor suggested that Steve Nardi, Dan Donovan, and a layperson be on the sub-committee. Jennifer Hensley volunteered to be on that

committee as the layperson. The task would be to go through the first fourteen sections, get them to DOA, and identify what needs to be done through rulemaking.

Chairman Taylor entertained a **motion** to establish a sub-committee on rules with Steve Nardi, Dan Donovan and Jennifer Hensley. Mike Sherwood so moved, seconded by Jennifer Hensley and the motion carried unanimously.

### **Interviews and Questions:**

Discussed setting a number of manageable one-day interviews. Talked about telephone interview. The attorney members of the Commission mostly know everyone in-state that applied, the people that a telephone interview would be useful for are those out-of-state to garner more information on before deciding that they come here for an interview. Since the applicants pay their own way to come for the interview, shouldn't require them to come unless they are considered serious candidates. It was suggested thinking about developing some sort of interview protocol, a list of questions that will be asked of each of them, and those questions that are not allowed to ask. May want to request more information in terms of writing samples, references, former employees, etc. Need screening criteria especially for the lay people on the Commission. Would like to reference someone that the applicant has supervised plus maybe 3 or 4 specific kinds of references that they would like to do checks on.

Chairman Taylor entertained a **motion** for a sub-committee on the Chief Public Defender to develop questions that will be circulated to all Commission members before the next meeting and some standards looking for in selecting the individual. Will also be circulated at the next (Conference Call) meeting for approval of the final version. Mike Sherwood so moved, seconded by Dan Donovan and the motion carried unanimously. Sub-committee – Caroline Fleming, Doug Kaercher, Steve Nardi.

### **Review of Butte Office Options:**

Garett Bacon, DOA, gave a slide presentation and a handout of the space options in Butte. The criteria that Garrett used in selecting the five sites:

- space that can be flexible and can grow in
- office space visible and accessible to the public
- having other state agencies at the location or nearby plug into data and phone systems
- space not in tough or dumpy neighborhood/public employees, public in general visiting
- conference area for the Commission meetings

Garett described each of the five sites (McCarthy Law Firm, Thornton Building, Finlen Hotel, New York Life Building, Hennessy Building) with information on the lease, cost per sq. ft., square footage, number of offices available, conference rooms, parking availability, phone system/security, and other features.

Ö Steve Nardi made a motion that a sub-committee be appointed consisting of the new Public defender, Jennifer Hensley, Steve Bender and Garrett Bacon to continue further negotiations and this sub-committee can choose the office space at any time they deem appropriate. Jennifer seconded and added that members and any decision that the

Commission

makes as a whole would be fully defensible decision based on the criteria discussed today,

these are all valid reasons to or not to choose an office.

Dan Donovan had trouble with the committee deciding without bouncing off the rest of the Commission. Jim had the same concerns as Dan and should be something the Commission decides and might want input from the Chief, but don't want to put it on the chief and throw the chief in the middle of politics.

Jennifer made a friendly amendment that the Commission has full and final approval of the decision made by the committee.

Just for clarification purposes the motion initially was that the new chief public defender, Jennifer, Garrett and Steve decide where the office would be and that would be the decision. A friendly amendment said that after the sub-committee meet and bring back to the full Commission. Steve Nardi seconded the friendly amendment.

The above motion was withdrawn.

It was then discussed to visit the properties on the evening of October 3rd and hold the interviews for the CPD on October 4<sup>th</sup>.

Mike Sherwood made a **motion** to defer any decisions until the next meeting with the understanding that the meeting will be held in Butte. The top three properties will be viewed for those who want to go and still allows the Commission a full day's work on October 4<sup>th</sup>. Wendy Holton seconded and the motion carried unanimously.

### **Collective Bargaining Agreements:**

Chairman Taylor asked Don Judge to report on the status of the collective bargaining agreements covering Public Defenders in Yellowstone and Missoula Counties.

Don Judge reported as follows:

The Yellowstone Public Defenders are represented by Teamsters Local 190. They have a two-year contract which expires July 1, 2006. They have a COLA (cost of living adjustment) clause which is tied to the CPD (consumer price index), that will provide a 2.7% increase as of July 1, 2005, but will need to see if the 2<sup>nd</sup> year adjustment which will be effective July 1, 2006 will comply with the new law.

The Missoula Public Defenders are represented by Teamsters Local 2. They have just prepared a Memorandum of Agreement for a one-year contract which expires July 1, 2006. This MOA provides recognitions of the new state-wide system and has wage increase provisions which will go into effect prior to July 1, 2006.

Both local unions recognize the potential termination of their bargaining units dependent upon the selection of transfers to a state-wide unit.

Questions and answers followed over section 69 provisions of the new law, employee rights and the chief public defender's authorities.

### **Workplan Revisited:**

Steve Bender revisited the workplan as it was not all covered at the July meeting starting with the two critical needs of the Legislature.:

- Case Management System for tracking caseloads and costs. The budget includes funding in FY06 for a case management system. Steve pointed out that this is a public procurement process and if we are going to buy a system will need to build in that much time to do an RFP.

Steve mentioned a review of the existing systems, and he asked if that is robust enough to buy a year to be able to pull through the five regional offices? If not, need to look at doing an RFP to get a new system and will need to be in contact with the budget office.

- Steve didn't see this as a problem and stressed how important it is to define accounting structures to keep the accounting in order, have good caseload numbers by type of case, by type of court, otherwise you will get pounded by it at the next legislative session.

Steve stressed the need to have an administrative rule process in place by the beginning of next fiscal year and will have to start now and know exactly where we are going in March 2006.

Steve indicating adopting Indigence Rules in ARM are specially required in the Act. There were two cases where specially required rules – indigence and complaint process. These are the rules that really affect private rights.

Consulting services needs (task force and sub-committees)

Even though the Commission can have their own staff, the question asked is if they can get agency help as well. Steve will handle the more administrative tasks and on the workplan identified his tasks to assist the Commission. There is a big block of hiring that the DOA's personnel officer will be working on with the Chief. There are other things such as getting office space, ordering furniture, getting PC network setup, etc. Statutorily required to help with the case management system, define accounting



structure with a good accountant. Steve suggested the Commission hire their own staff and offered three options for obtaining temporary help that will be needed in the areas of rulemaking, clerical or administrative help in terms of organizing distinct tasks, and help gathering and doing basic research on legal issues.

DOA would be willing to offer the service of an IT person to support the network, give you a plug and play network and maintain it for you.

**Budgeted Office Staff:**

At the July meeting it was asked what the budget looks like and the one page handout shows the budgeted positions. The spreadsheet shows what was contemplated for each of the job titles, the number of FTE's, type of position, budgeted starting date, salary level, and the anticipated job duties. Included was the existing county staff and the new county staff.

**Public Comment:**

There was no public comment.

**Meeting Schedule:**

Public Defender Commission meetings have been scheduled for Monday, October 3<sup>rd</sup>, for the viewing of office space, Tuesday, October 4<sup>th</sup> for interviews in Butte, and Monday, November 14<sup>th</sup>, location will be announced at a later date.

**Adjournment:**

Meeting adjourned at 4:00 P.M.